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## Lingering Hazardous Chemicals: Missouri's Step Toward Accountability in the Face of Corporate Market Ubiquity

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**Lingering Hazardous Chemicals: Missouri's Step Toward Accountability in the Face of Corporate Market Ubiquity**

*Clair v. Monsanto Co.*, 412 S.W.3d 295 (2013)

Adam Ellis

I. INTRODUCTION

This case note focuses on the legal ramifications stemming from the use, disposal, and environmental impacts of a chemical known as polychlorinated biphenyl ("PCB"), a product introduced to the United States in the late 1920s by Monsanto Company.<sup>1</sup> PCBs were mainly used as cooling and insulating fluids for industrial transformers and capacitors and were manufactured and released into the environment from the 1920s until their ban in 1979, but their persistent and toxic nature continue to have adverse impacts.<sup>2</sup> For example, there are still measurable amounts of PCB in feathers of birds currently held in museums.<sup>3</sup>

Active research spanning fifty years indicates that PCBs are carcinogens having the potential to adversely impact the environment.<sup>4</sup> However, between 1930 and 1977, Respondent, Monsanto Company, the sole

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<sup>1</sup> Karylyn Black Kaley, Jim Carlisle, David Siegel & Julio Salinas, *Health Concerns and Environmental Issues with PVC-Containing Building Materials in Green Buildings*, CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY (Oct. 2006), <http://www.calrecycle.ca.gov/Publications/Documents/GreenBuilding%5C43106016.pdf>.

<sup>2</sup> *Health Effects of PCBs.*, U.S. ENVIRONMENTAL PROTECTION AGENCY (Oct. 2006), <http://www.calrecycle.ca.gov/Publications/Documents/GreenBuilding%5C43106016.pdf>.

<sup>3</sup> Robert Riseborough & Virginia Brodine, *More Letters in the Wind*, ENVIRONMENT: SCIENCE AND POLICY FOR SUSTAINABLE DEVELOPMENT, Volume 12, Issue 1 (1970).

<sup>4</sup> Knut Breivik, Andy Sweetman, Jozef Pacyna, & Kevin Jones, "Towards a global historical emission inventory for selected PCB congeners – a mass balance approach" *The Science of Total Environment*, 290 (1-3), 181-198 (2002) available at: <http://www.sciencedirect.com/science/article/pii/S0048969701010750>.

producer of PCB in North America, produced over 600,000 tons of the chemical.<sup>5</sup> To this day, high levels of PCB pollution continue to be found in the United States.<sup>6</sup> This case note will focus on a recent Missouri case in which litigants from California developed non-Hodgkins Lymphoma and alleged that this was due to their exposure to PCB.<sup>7</sup>

## II. FACTS AND HOLDING

Appellants are three California residents who developed lymphohematopietic cancer, also known as Non-Hodgkin's Lymphoma, allegedly due to their exposure to polychlorinated biphenyls (PCBs) released into the environment by Respondent.<sup>8</sup> PCBs are a class of chemical compounds used in the manufacturing of capacitors, transformers, paints, varnishes, adhesives, hydraulic fluids, and carbonless copy paper.<sup>9</sup> PCBs were designed to be resistant to heat and chemical breakdown, and no known natural sources of PCBs exist in the environment.<sup>10</sup> This resilience has resulted in their continued presence in the environment to this day even though their manufacture and sale were banned in the United States over thirty years ago.<sup>11</sup>

Appellants brought action against the successor of the PCB's manufacturer, Pharmacia,<sup>12</sup> alleging negligence and strict liability.<sup>13</sup> In their negligence claim at the trial court level, Appellants alleged that Pharmacia was negligent in distributing and marketing various PCB products it was

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<sup>5</sup> *Id.*

<sup>6</sup> *Polychlorinated Biphenyls (PCBs)*, ILLINOIS DEPARTMENT OF PUBLIC HEALTH ENVIRONMENTAL FACT SHEET (Feb. 2009), <http://www.idph.state.il.us/envhealth/factsheets/polychlorinatedbiphenyls.htm>.

<sup>7</sup> *Clair v. Monsanto*, 412 S.W.3d 295 (Mo. Ct. App. 2013).

<sup>8</sup> *Id.* at 300.

<sup>9</sup> *Id.* at 301.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Pharmacia did business under the name of Monsanto at all times relevant to this case. In 2000, Old Monsanto merged with a subsidiary of Pharmacia and changed its name to Pharmacia. The entity now known as Monsanto was formed in 2000 and is defending Old Monsanto under an indemnification agreement. All further references to Monsanto are to Old Monsanto. *Id.* at 300 nn.1-2.

<sup>13</sup> *Id.* at 295.

“aware or should have been aware of the hazards of PCBs and either knew or should have known the PCBs would be released into the environment.”<sup>14</sup> At trial, Appellants used expert testimony to assert that Pharmacia knew as early as 1938 that PCBs were toxic if given enough exposure, and that Pharmacia had actual knowledge that many of its PCBs would be released into the environment by third parties.<sup>15</sup> In their strict liability claim, Appellants claim the PCBs were “defectively designed” because the PCBs made their way into the environment and the food chain as a result of the dumping of PCB-containing products and the incorporation of PCBs into “open-use” products like paints, varnishes, and adhesives.<sup>16</sup> Appellants contend that Pharmacia’s negligence and defective design resulted in their exposure to PCBs, which was a substantial factor in their development of cancer.<sup>17</sup>

Pharmacia then filed a motion for summary judgment arguing against both the negligence and strict liability claims.<sup>18</sup> With respect to the negligence claim, Pharmacia argued that it had “no duty to protect [Appellants] from the conduct of downstream users of PCBs or from injuries related to the presence of PCBs in the environment.”<sup>19</sup> With respect to the strict liability claim, Pharmacia asserted three different arguments.<sup>20</sup> First, Pharmacia argued that the Appellants “cannot prove they were harmed as a result of an intended or foreseeable use of the product.”<sup>21</sup> Second, Pharmacia argued that Appellants “have no evidence as to what PCBs they were exposed to, and therefore, the risk versus benefit analysis to determine whether the product was defective cannot be applied.”<sup>22</sup> Third, Pharmacia asserted that “if the court determines there is no duty in negligence, then there is no duty in strict liability.”<sup>23</sup>

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<sup>14</sup> *Id.* at 302.

<sup>15</sup> *Id.* at 301.

<sup>16</sup> *Id.* at 301-02.

<sup>17</sup> *Id.* at 302.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

The trial court granted summary judgment in favor of Pharmacia.<sup>24</sup> Because the Appellants could not specify what path the PCBs took from the manufacturer to their bloodstream nor when the PCBs in their blood was manufactured, the trial court reasoned that Pharmacia should not owe a duty to Appellants because it would mean Pharmacia was “an insurer of its products for all places, times, and conditions.”<sup>25</sup> In addition, the trial court noted that the connection between Appellant’s injuries and Pharmacia’s conduct was “not sufficiently close to weigh strongly in favor of imposing a legal duty on Pharmacia, and Pharmacia could not reasonably foresee its conduct would harm Plaintiffs.”<sup>26</sup>

The trial court further found public policy supported a holding exempting Pharmacia from a duty for this particular category of conduct.<sup>27</sup> Imposing this duty would be excessive, opined the trial court, because Pharmacia would be forced to defend against a potentially “limitless pool of plaintiffs.”<sup>28</sup> Further, the trial court noted that there was nothing they could do to prevent or mitigate future injuries because of the existing prevalence of PCBs in the environment.<sup>29</sup> As a matter of law, the trial court found that Pharmacia owed no duty to Appellants and granted their motion for summary judgment on the claim of negligence.<sup>30</sup>

In its judgment for the claim based on strict liability, the trial court found, as a matter of law, that Pharmacia cannot be held strictly liable to Appellants “for injuries caused by PCBs in the environment resulting from the unforeseeable and unintended uses of dumping, disposal, scrapping, recycling, incineration, and destruction of PCBs and PCB-containing products by third parties.”<sup>31</sup> The trial court found that Appellants “had not and would not be able to produce evidence sufficient to allow the trier of fact

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 303.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

to find intended and foreseeable uses of PCBs were a substantial factor in causing their injuries.”<sup>32</sup> For these reasons, the trial court granted the summary judgment in favor of Pharmacia on both the negligence and strict liability claims.<sup>33</sup>

The instant court reversed and remanded.<sup>34</sup> The Court of Appeals found that the trial court erred in granting summary judgment on the negligence claim because Appellants had established that Pharmacia owed a duty of reasonable care.<sup>35</sup> The Court of Appeals balanced a number of considerations, known as the “*Rowland* factors,”<sup>36</sup> in determining whether public policy clearly supported an exception from the general principle that “everyone in California has a duty to exercise reasonable care.”<sup>37</sup> The two primary *Rowland* factors the Court of Appeals considered on the question of legal duty were foreseeability and questions of public policy, namely, the extent of the burden on the defendant.<sup>38</sup> Ultimately, the Court of Appeals found that it was generally foreseeable that the design, manufacture, and distribution of PCBs could result in the type of injuries experienced, and the considerations of the *Rowland* public policy factors resulted in a finding that Pharmacia owed a duty of care as a matter of public policy.<sup>39</sup>

### III. LEGAL BACKGROUND

#### A. *Negligence Cause of Action*

The court cites to Section 1714 of the California Civil Code in determining whether Pharmacia owed a duty to the Appellants.<sup>40</sup> Specifically, the court quotes the pertinent portion of the statute:

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 300.

<sup>35</sup> *Id.* at 304.

<sup>36</sup> *Id.* at 305, *citing* *Rowland v. Christian*, 69 Cal.2d 108, 70 Cal. Rptr. 97, 443 P.2d 561, 564 (1968).

<sup>37</sup> *Id.* at 304.

<sup>38</sup> *Id.* at 305.

<sup>39</sup> *Id.* at 306, 309.

<sup>40</sup> *Id.* at 304.

Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.<sup>41</sup>

This portion of the statute means that everyone in California has a general duty to exercise reasonable care.<sup>42</sup> However, exceptions to this general principle have been carved out when they are clearly supported by the balancing of a number of considerations, called “the *Rowland* factors.”<sup>43</sup> These include: the degree of certainty that the plaintiff suffered injury; the closeness of the connection between the defendant’s conduct and the injury suffered; the foreseeability of harm to the plaintiff; the moral blame attached to the defendant’s conduct; the extent of the burden to the defendant; the policy of preventing future harm; the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and, the availability, cost, and prevalence of insurance for the risk involved.<sup>44</sup>

In *Rowland v. Christian*, a Supreme Court of California case from 1968, the plaintiff, Mr. Rowland, was a guest in the defendant, Ms. Christian’s, home.<sup>45</sup> The defendant had a cracked faucet handle that injured the plaintiff’s hand upon use.<sup>46</sup> The plaintiff alleged that the defendant was aware of the dangerous condition, and that the plaintiff’s injuries were proximately caused by the defendant’s negligence.<sup>47</sup> The defendant admitted she told the landlord that the faucet was defective and it should be replaced, but defendant also alleged contributory negligence and assumption of risk, alleging that plaintiff knew of the condition of the premises and he had

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<sup>41</sup> Cal. Civ. Code § 1714 (West 2012).

<sup>42</sup> *Clair*, 412 S.W.3d at 304.

<sup>43</sup> *Rowland v. Christian*, 69 Cal.2d 108, 70 Cal.Rptr. 97, 443 P.2d 561, 564 (1968).

<sup>44</sup> *Clair*, 412 S.W.3d at 304-05.

<sup>45</sup> *Rowland*, 69 Cal.2d at 110.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

merely failed to see the crack.<sup>48</sup> The court laid out the general California law on negligence as it existed then, “All persons are required to use ordinary care to prevent others being injured as a result of their conduct.”<sup>49</sup> Further, the court noted that no exceptions to this general rule should be made unless clearly supported by public policy.<sup>50</sup> It is here where the Court enunciates what are known as the *Rowland* factors.<sup>51</sup>

The Court in *Rowland* gathers case law from California’s history, and in one fell swoop, lays out clearly the considerations a court must make when determining if an exception to the general principle of negligence is supported by public policy.<sup>52</sup> These considerations, listed above, have been cited over 6,000 times since their conception,<sup>53</sup> including the citation in *Clair v. Monsanto*. But only two factors, foreseeability and the extent of the

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<sup>48</sup> *Id.* at 111.

<sup>49</sup> *Id.* at 112.

<sup>50</sup> *Id.* (Citing *Lipman v. Brisbane Elementary Sch. Dist.*, 55 Cal.2d 224, 229-30 (1961)). *Lipman* states that government officials are not personally liable for their discretionary acts within the scope of their authority even though it is alleged that their conduct was malicious. This is due to important policy considerations such as the subjection of officials to the burden of a trial and to the danger that it would impair their zeal in the performance of their functions.

<sup>51</sup> *Rowland*, 69 Cal.2d at 113.

<sup>52</sup> *Rowland*, at 112-13. The Court cites: *Schwartz v. Helms Bakery Limited*, 67 A.C. 228, 233, fn. 3, 60 Cal. Rptr. 510, 430 P.2d 68; *Hergenrether v. East*, 61 Cal.2d 440, 443—445, 39 Cal. Rptr. 4, 393 P.2d 164; *Merrill v. Buck*, 58 Cal.2d 552, 561—562, 25 Cal. Rptr. 456, 375 P.2d 304; *Chance v. Lawry's, Inc.*, 58 Cal.2d 368, 377, 24 Cal. Rptr. 209, 374 P.2d 185; *Lipman v. Brisbane Elementary Sch. Dist.*, 55 Cal.2d 224, 229-230 (1961); *Stewart v. Cox*, 55 Cal.2d 857, 863, 13 Cal. Rptr. 521, 362 P.2d 345; *Biakanja v. Irving*, 49 Cal.2d 647, 650, 320 P.2d 16, 65 A.L.R.2d 1358; *Wright v. Arcade School Dist.*, 230 Cal.App.2d 272, 278, 40 Cal. Rptr. 812; *Raymond v. Paradise Unified School Dist.*, 218 Cal.App.2d 1, 8, 31 Cal. Rptr. 847; *Prosser on Torts* (3d ed. 1964) pp. 148—151; 2 *Harper and James, The Law of Torts* (1956) pp. 1052, 1435 et seq.

<sup>53</sup> See *Rowland v. Christian*, *Citing References*, WESTLAW (Apr. 28, 2015, 2:58pm), [https://a.next.westlaw.com/RelatedInformation/I434dce0efad911d9bf60c1d57ebc853e/kcCitingReferences.html?originationContext=documentTab&transitionType=CitingReferences&contextData=\(sc.DocLink\)&docSource=410929f2fcc645d3ad851e38003d039c](https://a.next.westlaw.com/RelatedInformation/I434dce0efad911d9bf60c1d57ebc853e/kcCitingReferences.html?originationContext=documentTab&transitionType=CitingReferences&contextData=(sc.DocLink)&docSource=410929f2fcc645d3ad851e38003d039c).



burden to the defendant, have evolved to become the primary factors to be considered on the question of legal duty supporting negligence liability.<sup>54</sup>

In 2004, *Vasquez v. Residential Investments, Inc.* became the first case to note the evolution of the *Rowland* factors into two primary considerations.<sup>55</sup> In *Vasquez*, the court clearly states that the *Rowland* factors that are to be weighed in the balancing analysis will vary with each case,<sup>56</sup> but the factors of foreseeability and the extent of burden to the defendant “have evolved to become the primary factors considered in every case.”<sup>57</sup> The most recent case that upholds this list of primary factors, and is cited by the court in *Clair*, is the 2012 case *Campbell v. Ford Motor Co.*<sup>58</sup>

The courts in *Campbell* and *Clair* both cite to *Cabral v. Ralphs Grocery Co.*,<sup>59</sup> a 2011 case, explaining an important feature of the *Rowland* analysis: the factors are to be evaluated at a relatively broad level of factuality.<sup>60</sup> Thus, as to foreseeability, as the court in *Cabral* put it, the court’s task in determining duty “is not to decide whether a particular plaintiff’s injury was reasonably foreseeable in light of a particular defendant’s conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed...”<sup>61</sup> Further, the court noted a distinct difference between a determination that the defendant did not breach the duty of ordinary care, which is for the jury to decide in a trial, and a determination that the defendant owed the plaintiff no duty of ordinary care to begin with, which is for the court to decide.<sup>62</sup> If the court finds the defendant owed the plaintiff a duty of ordinary care, the jury may consider the likelihood or foreseeability of injury in determining

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<sup>54</sup> *Clair*, 412 S.W.3d at 305.

<sup>55</sup> 118 Cal.App.4th 269 (2004).

<sup>56</sup> *Id.* at 280.

<sup>57</sup> *Id.* at 280, n. 5.

<sup>58</sup> 206 Cal.App.4th 15, 33 (2012).

<sup>59</sup> 51 Cal.4th 764.

<sup>60</sup> *Id.* at 772.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

whether the particular defendant's conduct was negligent in the first place.<sup>63</sup> A court would first have to identify the conduct of a defendant as categorical "no duty" conduct in order to absolve the defendant of a duty of ordinary care.<sup>64</sup> However, once a court identifies that a category of conduct may require a duty of ordinary care, the debate does not end there. The court still must turn to the question of foreseeability and examine whether the other *Rowland* factors justify creating a duty exception.<sup>65</sup>

### B. *Strict Products Liability Cause of Action*

The elements of a strict products liability cause of action are: (1) a defect in the manufacture or design of the product or a failure to warn, (2) causation, and (3) injury.<sup>66</sup> According to the California Supreme Court, a product can be found defective under one of two tests: the consumer expectations test or the risk-benefit test.<sup>67</sup> Under the consumer expectations test, the plaintiff must prove that the product failed to perform as safely as an ordinary consumer would expect when used in a reasonably foreseeable manner in order for the product to be defective in design.<sup>68</sup> Under the risk-benefit test, two things must happen in order to prove a product is defective in design: (1) the plaintiff must prove that the product's design proximately caused injury, and (2) the defendant must have failed to prove that the benefits of the challenged design outweigh the risk of danger inherent in such design.<sup>69</sup> The risk-benefit test is to be used when the ordinary consumer would have difficulty knowing what to expect concerning the safety design of a product.<sup>70</sup> If the product embodies "excessive preventable danger," or if the jury finds that the risk of inherent danger in the challenged design outweighs the benefits of such design, the product is defective in design.<sup>71</sup>

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<sup>63</sup> *Clair*, 412 S.W.3d at 305 (citing *Cabral*).

<sup>64</sup> *Id.* at 305-06.

<sup>65</sup> *Id.* at 308.

<sup>66</sup> *Nelson v. Superior Court*, 144 Cal.App.4th 689, 695 (2006).

<sup>67</sup> *Barker v. Lull Engineering Co. Inc.*, 20 Cal.3d 413, 430-32 (1978).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* See also, *Moreno v. Fey Manufacturing Corp.*, 149 Cal.App.3d 23, 26-27 (1983).

<sup>70</sup> *Bates v. John Deer Co.*, 148 Cal.App.3d 40, 52 (1983).

<sup>71</sup> *Barker*, 20 Cal.3d at 430.

## LINGERING HAZARDOUS CHEMICALS

The jury may consider several factors in evaluating the adequacy of a product's design.<sup>72</sup> These factors include "the gravity of the danger posed by the design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design."<sup>73</sup>

To establish a *prima facie* case under strict products liability, the plaintiff must show that his or her injury was proximately caused by the product's design.<sup>74</sup> To make this showing, the plaintiff must produce evidence showing that he or she was injured while using or coming into contact with the product in an intended or reasonably foreseeable manner.<sup>75</sup> The plaintiff must also show that the absence of a safety device or the nature of the product's design frustrated his or her ability to avoid injury.<sup>76</sup>

Once the plaintiff makes a *prima facie* case by showing that his or her injury was proximately caused by the product's design, the burden shifts to the defendant to prove that the product was not defective.<sup>77</sup> The defendant bears the ultimate burden of proof to establish that its product was not defective because the plaintiff's injury resulted from misuse of the product; this burden should be distinguished from the burden on the plaintiff making a *prima facie* case.<sup>78</sup> If the defendant shows that the plaintiff misused the product in such a highly extraordinary, unforeseeable way, the defendant has an affirmative defense absolving it of its wrongful conduct.<sup>79</sup> Because a manufacturer is required to reasonably foresee misuse of a product by a user

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<sup>72</sup> *Id.* at 431.

<sup>73</sup> *Id.*

<sup>74</sup> *Clair*, 412 S.W.3d at 305. (citing *Perez v. VAS S.p.A.*, 188 Cal.App.4th 658, 676 (2010)).

<sup>75</sup> *Perez*, 188 Cal.App.4th at 678.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Chavez v. Glock, Inc.*, 207 Cal.App.4th 1283, 1308 (2012).

or a third party, the class of foreseeable uses is quite broad.<sup>80</sup> Foreseeability of this nature is a question for the jury.<sup>81</sup>

California case law establishes that plaintiffs involved in injury suits for the development of cancer due to exposure to toxic chemicals must also show, in addition to the aforementioned burdens, some threshold exposure to the toxic chemical, and must prove that exposure was a “substantial factor causing the illness by showing by a reasonable medical probability that the plaintiff’s exposure contributed to the plaintiff’s risk of developing cancer.”<sup>82</sup>

#### IV. INSTANT DECISION

##### A. *Negligence Claim*

In the instant case, the Missouri Court of Appeals in the Eastern District reviewed the granting of summary judgment *de novo* and applied California law to evaluate the merits of the Appellants’ substantive claims.<sup>83</sup> The appellate court began its analysis with the argument that the trial court erred in granting summary judgment on the Appellants’ negligence claim brought under California law because Appellants had established Pharmacia owed them a duty of reasonable care.<sup>84</sup> Analyzing the California Civil Code on Obligations Imposed by Law,<sup>85</sup> the appellate court established that “generally everyone in California has a duty to exercise reasonable care.”<sup>86</sup>

<sup>80</sup> Nelson v. Superior Court, 144 Cal.App.4th 689, 698 (2006).

<sup>81</sup> Chavez, 207 Cal.App.4th at 1308 (internal citations omitted).

<sup>82</sup> Clair, 412 S.W.3d at 312.

<sup>83</sup> *Id.* at 304. (citing Moore ex rel. Moore v. Bi-State Development Agency, 87 S.W.3d 279, 285 (Mo.App. E.D. 2002). The Court of Appeals applied Missouri law for the standard of review, as it noted that a forum state will always apply forum procedure. Further, the court stated with regard to substantive law, a forum state will choose the applicable law according to its own conflict of law doctrines. *Id.* For tort claims, Missouri applies the test set forth in the Restatement (Second) of Conflict of Laws Section 145 (1971). *Id.* Because the injuries occurred in California, the Appellants came into contact with PCBs in California, the Appellants all reside in California, and the parties all agree that California law applies to the substantive claims in this case, the court applied Section 145 of the Restatement and found California law should be used to evaluate the substantive claims.

<sup>84</sup> Clair, 412 S.W.3d at 304.

<sup>85</sup> Cal. Civ. Code § 1714 (West 2012).

<sup>86</sup> Clair, 412 S.W.3d at 304.

However, the appellate court noted that exceptions from this general principle are made when public policy clearly supports the exception.<sup>87</sup> Courts must balance a number of considerations known as the “*Rowland* factors”<sup>88</sup> to determine if public policy supports the exception from the general rule.<sup>89</sup> The considerations that have evolved into the two primary *Rowland* factors to be considered on the question of legal duty are foreseeability and the extent of burden to the defendant; the factors are evaluated at a relatively broad level of factual generality.<sup>90</sup>

The appellate court continued its analysis by next examining the foreseeability of harm to the plaintiff.<sup>91</sup> The court explained that its task in determining a duty owed is to evaluate whether the “category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced.”<sup>92</sup> Two different types of determinations must be distinguished by the court when discussing foreseeability: a determination that the defendant owed the plaintiff no duty of ordinary care, and a determination that the defendant did not breach the duty of ordinary care.<sup>93</sup> The former determination is for the court to make, while the latter determination is for the jury to make.<sup>94</sup>

Using this rule, the court reviewed the trial court’s holding that Pharmacia did not breach the duty of ordinary care to Appellants, and found that because the trial court made determinations on the category of conduct that Pharmacia undertook, it incorrectly made fact-finding determinations<sup>95</sup>

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<sup>87</sup> *Id.*

<sup>88</sup> *Rowland*, 443 P.2d at 564.

<sup>89</sup> *Clair*, 412 S.W.3d at 304.

<sup>90</sup> *Id.* at 305 (citing *Campbell v. Ford Motor Co.*, 141 Cal. Rptr. 3d 390 (Cal. Ct. App. 2012); *Cabral v. Ralphs Grocery Co.*, 248 P.3d 1170, 1175 (Cal. 2011)).

<sup>91</sup> *Clair*, 412 S.W.3d at 305.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> The factual determinations made include: that the Appellants could not specify when the PCBs in their blood were manufactured or what path they took from the manufacturer to each Appellant, and that it was possible the Appellants ingested PCBs illegally dumped by third parties decades after they were manufactured. *Id.* at 306.

on the breach of ordinary care, instead of the duty owed.<sup>96</sup> The appellate court further noted that the trial court made an incorrect determination of the category of conduct at issue; Pharmacia's category of conduct at issue was not protecting Appellants from the conduct of downstream users of PCBs, as the trial court said, but the design, manufacturing, and distribution of PCBs.<sup>97</sup> The appellate court made this finding because the actual conduct at issue involved the design, distribution, and manufacturing of PCBs, a unique class of chemicals resistant to environmental breakdown, and the duty to protect Appellants from the conduct of downstream users of PCBs is too expansive.<sup>98</sup>

After determining the category of negligent conduct, the appellate court then continued its analysis of foreseeability by determining whether the design, distribution, and manufacture of PCBs was sufficiently likely to result in the kind of harm experienced by the Appellants.<sup>99</sup> Because the *Rowland* factors are evaluated at a broad level of general factuality, the appellate court found that Appellants provided sufficient evidence showing that Pharmacia had a duty to exercise reasonable care in the design, distribution, and manufacture of PCBs because it was "generally foreseeable" that this conduct may increase the risk of developing non-Hodgkin's lymphoma.<sup>100</sup> Because PCBs are very stable and resistant to environmental breakdown, because Appellants provided evidence that the presence of PCBs in the environment resulted in an increased risk of cancer for those exposed to PCBs, and because, given the nature of PCBs, the lapse between their creation and Appellants' injuries is irrelevant, specific factual questions regarding foreseeability and proximate cause should be handled by the jury, not by a court making determinations of duty as a matter of law, as the trial court did.<sup>101</sup>

After determining foreseeability, the appellate court examined the *Rowland* public policy factors to determine whether a duty exception still

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 308.

existed in the instant case.<sup>102</sup> The specific question the court examined is whether the policy of preventing future harm by imposing costs upon Pharmacia is outweighed by undesirable consequences of allowing potential liability or laws indicating approval of designing, distributing, and manufacturing PCBs.<sup>103</sup> The appellate court found no such laws indicating approval of this conduct.<sup>104</sup> Further, the appellate court dispelled the notion that Pharmacia should escape liability because of the flood of litigation in St. Louis courts and of the potentially limitless pool of possible plaintiffs, as they were very successful in designing, distributing, and manufacturing PCBs.<sup>105</sup> The court opined that it would not be sound policy to allow the mere ubiquitous nature of PCBs to preclude liability because such a finding might allow manufacturers to avoid taking precautions to produce a safe product as long as it made enough of the product.<sup>106</sup> The court stated that the imposition of a duty in this instance, while it would do little to prevent future harm from PCBs, serves as a warning to manufacturers creating dangerous products.<sup>107</sup>

Because Appellants sufficiently alleged the possibility of causation by providing evidence showing Pharmacia had a duty to exercise reasonable care in the design, manufacture, and distribution of PCBs, it was generally foreseeable that such a category of conduct could result in the harm experienced by Appellants.<sup>108</sup> Evidence was also presented that PCBs in the environment resulted in an increased risk of cancer for those exposed to PCBs, and because the ubiquitous nature of PCBs does not preclude liability, the appellate court found that the public policy factors in *Rowland* did not persuade it that Pharmacia does not owe a duty of care.<sup>109</sup> The appellate court held that the trial court erred in granting summary judgment with

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 308-09.

<sup>106</sup> *Id.* at 309.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 308-09.

<sup>109</sup> *Id.*

respect to Appellant's cause of action for negligence because Appellants established that Pharmacia owed a duty of reasonable care.<sup>110</sup>

### B. *Strict Liability Claim*

In deciding the claim of strict liability by design defect, the appellate court first questioned whether the post-use disposal of PCBs was foreseeable by looking at evidence demonstrating that Pharmacia knew, or should have known, that many of its PCBs would enter the environment through disposal by third parties.<sup>111</sup> The appellate court stated that the elements of a strict products liability cause of action are "a defect in the manufacture or design of the product or a failure to warn, causation, and injury."<sup>112</sup> Specifically, Appellants must show that "the product is placed on the market; there is knowledge that it will be used without inspection for defect; the product proves to be defective; and the defect causes injury."<sup>113</sup>

As for deciding whether the products containing PCBs were defective in design, the court used the "risk-benefit test because a normal consumer would not know what to expect concerning a safe design of a PCB."<sup>114</sup> Under this test, a product is defective in design if Appellants prove that the product's design "proximately caused injury" and Pharmacia fails to prove, in light of the relevant factors, that on balance, "the benefits of the challenged design outweigh the risk of danger inherent in such design."<sup>115</sup> To find a product defective in design requires a jury determination that the design embodies "excessive preventable danger" and that the risk of danger outweighs the benefits of such a design.<sup>116</sup> Factors used in balancing the risks and benefits include:

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* (citing *Nelson v. Superior Court*, 144 Cal.App.4th 689, 695, 50 Cal.Rptr.3d 684 (2006)).

<sup>113</sup> *Id.* (citing *Nelson*, 144 Cal.App.4th at 689).

<sup>114</sup> *Id.* (citing *Perez v. VAS S.p.A.*, 188 Cal.App.4th at 676, n.4 (2010)).

<sup>115</sup> *Id.* (citing *Perez*, 118 Cal.App.4th at 676).

<sup>116</sup> *Id.* (citing *Barker*, 20 Cal.3d at 430).



the gravity of danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.<sup>117</sup>

Once Appellants have made a prima facie showing that their injuries were proximately caused by Pharmacia's product design, the burden shifts to Pharmacia to prove that its product is not defective in light of the preceding factors.<sup>118</sup> To make a prima facie case, Appellants must show evidence that they were injured while using or coming into contact with the product in "an intended or reasonably foreseeable manner" and that no safety device or safe nature of the product allowed Appellants to avoid injury.<sup>119</sup> The appellate court held that the trial court erred in determining that Pharmacia could not be held strictly liable because the trial court made a fact-finder's determination that post-use disposal of PCBs was unforeseeable after Appellants had made the requisite prima facie case.<sup>120</sup>

Next, the appellate court decided whether a genuine issue of material fact existed. Appellants introduced expert testimony regarding Pharmacia's internal documents showing that it knew or should have known its PCBs would be improperly disposed of by third parties.<sup>121</sup> Appellants also introduced laboratory analysis showing that they had elevated levels of PCBs in their bloodstream.<sup>122</sup> Further expert testimony described how the risk of non-Hodgkin's lymphoma increased the more prevalent PCBs are in the blood, and because Appellants' blood levels show that PCBs were a substantial factor in their development of lymphoma, the appellate court held that Appellants did in fact show that there is a genuine issue of material fact

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<sup>117</sup> *Id.* at 309-310 (citing *Barker*, 20 Cal.3d at 431).

<sup>118</sup> *Id.* at 310.

<sup>119</sup> *Id.* (citing *Perez*, 188 Cal.App.4th at 678).

<sup>120</sup> *Id.* at 311.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

of whether their injuries were caused by a foreseeable misuse of PCB-containing products.<sup>123</sup>

Next, the appellate court opined on the trial court's second finding for Pharmacia that Appellants could not prove whether the PCBs in their blood were from other PCB sources or "open-use" products containing PCBs.<sup>124</sup> The appellate court, in determining whether the sources of the PCBs mattered, relied on a California case<sup>125</sup> rule that Appellants must "show some threshold exposure to PCBs and must prove that exposure was a substantial factor causing the illness."<sup>126</sup> Appellants can show this by introducing a "reasonable medical probability" that their exposure to PCBs contributed to their risk of developing cancer.<sup>127</sup> Appellants brought in evidence showing that their blood contained elevated levels of PCB.<sup>128</sup> They further brought in various experts to testify to internal documents that show Pharmacia should have known that its open-use PCBs would result in substantial releases of those PCBs into the environment.<sup>129</sup> Further evidence by Appellants indicated that Pharmacia knew open-use PCB products were the "major source" of PCBs entering the environment.<sup>130</sup>

The appellate court looked to Appellants' evidence to decide whether a genuine issue of material fact existed regarding whether their injuries were caused by foreseeable and intended uses of open-use PCB-containing products.<sup>131</sup> Using the preceding evidence, the appellate court found that at least a genuine issue of material fact existed with respect to whether Appellants' injuries were caused by foreseeable and intended uses of open-use PCB-containing products, and the trial court erred in granting summary

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<sup>123</sup> *Id.* at 312.

<sup>124</sup> *Id.*

<sup>125</sup> *Rutherford v. Owens-Illinois, Inc.*, 16 Cal.4th 953, 982, 67 Cal.Rptr.2d 16, 941 P.2d 1203 (1997).

<sup>126</sup> *Clair*, 412 S.W.3d at 312 (citing *Rutherford*, 16 Cal.4th at 982).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 313.

<sup>131</sup> *Id.*

judgment for Pharmacia regarding Appellants' cause of action for design defect.<sup>132</sup>

On August 22, 2013, the "Motion for Rehearing and/or Transfer to the Supreme Court" was denied, and on November 26, 2013, the "Application for Transfer to the Supreme Court" was denied.<sup>133</sup>

## V. COMMENT

This decision has enormous implications, and is the first of several hundred cases moving forward from plaintiffs with non-Hodgkin's lymphoma and an elevated level of PCBs in their bloodstream.<sup>134</sup> According to the press release submitted after the court of appeals decision, "[t]he case represents the first time that injured victims have sought to hold a company accountable for producing a chemical that has contaminated the entire planet, including every person in the United States."<sup>135</sup> Though imposing a duty could do little to prevent future harm from PCBs, this decision effectively serves as a warning for manufacturers to be cautious in their design, marketing, and production of potentially harmful products.<sup>136</sup> The denial of transfer and/or rehearing from the Missouri Supreme Court has hermetically sealed the court of appeals decision from augmentation.

Large companies worldwide produce chemicals that are potentially hazardous to human health, and they can no longer hide from liability under the veils of ubiquity or product misuse. Should other courts adopt the rules set by the court of appeals in Missouri, a country-wide standard may be set, and it may even prompt federal action to determine new standards for

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Ross Bonander, Lymphoma Patients Suing Monsanto Get Favorable Appeals Ruling, LYMPHOMAINFO.NET (July 29, 2013) <http://www.lymphomainfo.net/news/lymphoma-in-the-news/lymphoma-patients-suing-monsanto-get-favorable-appeals-ruling>.

<sup>135</sup> *Id.*

<sup>136</sup> Mistake as to the chemical or product furnished or misdescription thereof by label or otherwise as basis of liability for personal injury or death resulting from combination with other chemical, 123 A.L.R. 939 (1939).

products potentially harmful to human health. Though the court of appeals did not discuss the application of this decision to other industries or products, this case may be a springboard for other types of products liability claims, not just chemically hazardous products.

It is a shame that the Supreme Court of Missouri denied the motion to transfer the court of appeals decision. The Supreme Court may well have further defined or constricted the standards to be met by producers of potentially dangerous material. The Supreme Court could have deteriorated the court of appeals decision, but in any case, the denial of transfer means that the case is to be remanded to determine the issues of fact still present using the rules the court of appeals has dictated.<sup>137</sup>

While public policy factors were used to determine whether an exception from the general duty of ordinary care existed, the court of appeals did not discuss the public policy factors of deciding a case of this magnitude. While it is just to decide a case in a vacuum without external influences, the court of appeals should have addressed or possibly lessened the likelihood that courts could be flooded with plaintiffs from around the country citing this case to recover from injuries occurring from products that were not intended to be used by such a person. Companies now must be aware that bystanders could bring a suit even if the consumer of a hazardous product misused the product in a foreseeable way to cause harm to the bystander. Product misuse, an affirmative defense, can now only be effective when the misuse by the consumer is “so highly extraordinary as to be unforeseeable.”<sup>138</sup> Essentially, manufacturers of a dangerous product may have little recourse if the plaintiff shows that his or her injuries stemmed from a foreseeable misuse of the dangerous product. A court merely needs to generally evaluate whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced.

Companies who have previously manufactured and sold hazardous products must now be aware that they could be strictly liable for injuries resulting from those products, even if they are banned or no longer on the

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<sup>137</sup> *Clair*, 412 S.W.3d at 300.

<sup>138</sup> *Id.* at 310 (citing *Chavez v. Glock, Inc.*, 207 Cal.App.4th at 1308).

market. Insurance policies may be purchased by companies creating dangerous products to protect them from the possibility of huge legal claims. As long as it was generally foreseeable by the producer that the design, manufacture, and distribution of a hazardous product could result in a plaintiff's injuries, a company today may have to answer for its negligence in the past. This could have significant ramifications for companies that produce hazardous chemicals. An important aspect of this decision is that it does not address the hazardous byproducts that result from the creation or distribution of an otherwise safe product. Air pollution from refineries and chemical plants is not subject to a products liability claim, so no redress may be available for plaintiffs injured as a foreseeable consequence to the pollution. The Clean Air Act may be an avenue for these types of plaintiffs, and this case is perhaps the first step to a federal program to hold companies liable for products that may be currently banned but continue to harm people.

The fact that this decision creates the possibility of legal liability for actions a company took many years ago is troublesome, however. A perfectly compliant company with a decades old creed of environmental safety and responsibility could nonetheless be sued for reckless behavior during the development of the company in the last century. The court of appeals in *Clair* does not create a standard of strict liability, and many findings of fact regarding the different *Rowland* factors must still be made to hold a company liable. But a company may, nonetheless, be unable to escape from the mistakes its predecessors made. The legal costs from paying a seemingly endless list of plaintiffs along with the ensuing public embarrassment and condemnation from consumers may well cost a company its life upon the conclusion of a trial. Though this cost is not a primary *Rowland* factor to be examined by a court, companies should continue to lobby courts to give this factor more weight. Further, another factor that could have been introduced by the court of appeals in *Clair* to add to the *Rowland* factors is the company's current and historical devotion to environmental and consumer safety and protection. If this factor was introduced, companies that have been doing the right thing for many years may feel less fear from this ruling.

## VI. CONCLUSION

This case represents the first time that a company may be held liable for producing a chemical that has potentially contaminated every person in the United States. The Court of Appeals has created a new task for courts to determine liability. No longer should a court decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct. Now, a court must evaluate more generally whether the category of negligent conduct is sufficiently likely to result in the kind of harm experienced by the plaintiff. Once the foreseeability of harm due to the negligent conduct is established, it is then the court's task to determine whether that conduct is appropriate for a general no-duty ruling. To determine this, the court must use several public policy factors, including: the gravity and likelihood of danger resulting from eliminating the duty, the financial cost of improving the design, and the adverse consequences to the product and to the consumer that would result from imposing a duty. This case is among the first to claim that mere ubiquity in the market is not sufficient to shield a company from liability due to the harmful effects of its products.

